



**Musyoka & another v Kinuthia & another (Civil Appeal
71 of 2019) [2022] KEHC 17054 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 17054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 71 OF 2019
MN MWANGI, J
JUNE 30, 2022**

BETWEEN

CHARLES MUSYOKA 1ST APPELLANT

BASH HAULIERS 2ND APPELLANT

AND

JOHN NJOROGE KINUTHIA 1ST RESPONDENT

JOSEPH KINUTHIA KARANJA 2ND RESPONDENT

RULING

1. The respondents' notice of motion dated March 9, 2021 is brought under the provisions of sections 3A, 3B and 27 of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. The respondents seek the following orders –
 - i. That the respondents be awarded party and party costs for this appeal; and
 - ii. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the affidavit sworn on March 9, 2021 by Joseph Kinuthia Karanja, the 2nd respondent herein, on his own behalf and on behalf of the 1st respondent. He averred that the court dismissed an appeal against them on the October 3, 2019 but there was no mention of the issue of costs although they had prayed for the same.
3. He averred that their advocate tried to negotiate an out of court settlement in futility, and since costs follow the event and the appeal was dismissed in their favour, they are entitled to costs.
4. He stated that the award of costs is at the discretion of the court and in the interest of justice, they should be awarded costs since they were forced to instruct an advocate and pay legal fees so as to defend the appeal.



5. The application was opposed through a replying affidavit sworn on August 9, 2021 by Sammy Kamau Wanjiku, the appellants' Insurers' Claim Manager in exercise of the insurer's rights of subrogation. He averred that on May 6, 2021 parties recorded a consent for stay of execution pending appeal before Hon. P.J Otieno which was adopted as an order of the court, on condition that the decretal amount plus costs would be deposited in a joint earning account within 30 days. He stated that the appellants were to file and serve a Record of appeal within 30 days and that in default of compliance with the two conditions, the appeal was to stand dismissed.
6. He averred that the appellants failed to file their record of appeal within 30 days making the default clause under the consent order to take effect, whereby the appeal stood dismissed. He stated that costs were never sought in the consent and that the appeal was never dismissed by the Court.
7. The application was canvassed by way of written submissions. The respondents' submissions were filed on September 24, 2021 by the law firm of Matata & Mwabonje Advocates, while the appellants' submissions were filed on October 7, 2021 by the law firm of Mogaka Omwenga & Mabeya Advocates.
8. Mr. Matata, learned counsel for the respondents submitted that a consent was recorded and adopted as an order of the court to the effect that there was to be stay of execution of the decree by the lower court pending the appeal, on condition that the decretal amount plus costs was to be deposited in a joint earning account within 30 days. He stated that another condition was for the appellants to file and serve the record of appeal within 30 days and in default of compliance with the two conditions, the appeal was to stand dismissed. He further submitted that the appellants failed to honour the conditions stipulated in the said consent resulting in the appeal being automatically dismissed. He cited the case of *Re Estate of Kiptoo Lagat (Deceased)* [2021] eKLR, where the court held that it would amount to an injustice on the citor if costs were denied where the citee failed to act diligently while being aware of the proceedings.
9. The respondents' counsel stated that awarding costs is at the discretion of the court but in this case, the respondents were praying to be awarded costs in order to recoup the expenses incurred in defending the appeal that was eventually dismissed due to the inaction of the appellants. To buttress his submissions, he cited the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, where the court held that it is well recognized that the principle that costs follow the event is not to penalize the losing party; but it is for compensating the successful party for the trouble taken in prosecuting or defending the case.
10. Ms. Kerubo, learned counsel for the appellants submitted that in the consent that was adopted as an order of the court, no costs were awarded to the respondent. She contended that the consent should not be interpreted to mean that the other parties succeeded in the suit, as it means that both parties played a part in the final determination of the suit. In support of her submissions, she relied on the case of *Rufus Njuguna Miringi & another v Martha Muriithi & 2 others* [2012] eKLR.
11. She also submitted that a consent order cannot be selectively enforced, since it is binding on the parties and an attempt to seek costs by the respondent amounts to a review which is not sustainable. She cited the Court of Appeal decision in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, where the court stated that it could not interfere with a consent judgment except in such circumstances as would afford good grounds for varying a contract between the parties.



Analysis And Determination.

12. It is common ground that on May 6, 2019, the parties herein in the presence of their counsel recorded a consent and the same was adopted as an order of the court in the following terms:

- “(i) There be stay of execution of Judgment (sic) of the lower Court dated March 21, 2019 pending appeal on the following conditions-
- i. The appellant (sic) shall deposit the decretal sum plus costs of Kshs. 3,150,953 into a joint interest earning account in the names of the advocates for the parties within 30 days from today;
 - ii. The appellant shall file and serve a record of appeal within 30 days from today” (emphasis added).

13. Even if costs had not been included in the above consent, the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR is instructive as it addressed the issue of costs in an instance where parties had entered into a consent but had not made any mention of whether costs were payable and by which of the parties. The court held thus-

“But, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case.”

14. Having considered the above authority, which is persuasive to this court, it is my finding that since the consent provided for deposit of the decretal sum and costs, the respondents herein are entitled to their costs of the appeal. It does not matter that the appeal was not admitted to hearing. What is of significance is that the respondents instructed an Advocate to defend the appeal and they incurred costs by so doing.

15. The appellants herein provoked the instant appeal, entered into a consent with the respondents on May 6, 2019, which afforded them a stay of execution of the judgment of the trial court pending appeal. However, the appellants did not comply with the conditions of the consent recorded on May 6, 2019, and adopted as an order of the court. Consequently, after the elapse of 30 days from the date of the consent, the appeal stood automatically dismissed. From the foregoing, it can be discerned that the respondents herein were the successful parties.

16. It is noteworthy that the consent entered into expressed that the deposit of Kshs. 3,150,953.00 was not only for the decretal amount but included costs as well. The said consent has neither been set aside nor was it obtained by fraud, or collusion or misrepresentation. The consent is also not contrary the policy of the court. As such, the consent entered into on May 6, 2019 and adopted as orders of the court is



binding on the parties herein. See *Hirani v Kassam* [1952] 19 EACA 131 at 134. The respondents shall therefore have the costs of the appeal and the costs of the instant application.

It is so ordered

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF JUNE 2022.
RULING DELIVERED THROUGH ONLINE TEAMS PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of-

Ms Kerubo for the appellants

No appearance for the respondents

Mr. Oliver Musundi – Court Assistant.

